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Samuel L. Butt
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



NORBERTO JORGE LEVIN, FONDO DE
INVERSION PRIVADO LEVIN GLOBAL,

Plaintiffs-Appellants,

against

CARLOS LUIS SALVINI, MAURICIO VALENTIM GUGLIANO,

Defendants-Respondents.

Case No.
2025-00782

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	4
I. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD AND THE DECISION SHOULD BE REVERSED	4
A. The Trial Court Acknowledged The Lack Of Evidence Of Gross Disproportionality And Improperly Placed The Burden On Appellants.....	5
B. The Trial Court’s Credibility Determinations Do Not Establish Disproportionality.....	7
C. The Email Communications Discussing Increasing The Liquidated Damages Amount Do Not Demonstrate Disproportionality	8
D. Defendants’ Argument That There Must Be An Attempt To Proportion Damages Is Contrary To Recent Court Of Appeals Precedent.....	9
E. Whether Liquidated Damages Disincentivize Breach Is Irrelevant Unless The Damages Are Disproportionate	12
F. Defendants’ Claimed “Penal Intent” Continues To Use The Wrong Test And Fails On The Merits As Well	13
1) Section 13.2 Does Not Establish Penal Intent	14
2) Application Of Liquidated Damages Regardless Of The Length Of Competition And To Each Contributor Who Breaches Does Not Establish Disproportionality	16

G.	Evidence Concerning Distributions Made By The Fund Or Of Its Debts Does Not Establish Gross Disproportionality	18
II.	THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE RELATING TO COSTS AND LOSSES AS WELL AS EXHIBIT P-47	19
A.	Defendants Sought Unpaid Dividends From 2014 At Trial, Which Belies Their Contention Now That Dividends Were “Never Intended” To Be Paid By The Fund.....	19
B.	Losses And Costs At The Operating Company, Even If Not Recoverable, Were Relevant To Damages Sustained By The Fund	21
C.	Plaintiffs Assert Direct Claims For Breach Of The Contributors Agreement, Not Derivative Claims Based On Their Status As Stockholders	22
D.	Foundation For Admitting Exhibit P-47 Would Have Been Given At Trial Had The Trial Court Not Preemptively Excluded It For Other Reasons.....	25
E.	The Trial Court Did Not Exclude Exhibit P-47 Based On Prejudice, Confusion, Or Potential To Mislead	27
F.	Defendants Misrepresent Facts About Mr. Levin, Who Could Competently Testify About Costs and Lost Profits	28
	CONCLUSION.....	29
	PRINTING SPECIFICATIONS STATEMENT	31

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abra Construction Corp. v. 112 Duane Associates, LLC</i> , 59 A.D.3d 263 (1st Dep’t 2009)	29
<i>Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.</i> , 147 A.D.3d 122 (3d Dep’t 2017)	24, 25
<i>Acosta v. Yale Club of New York City</i> , 261 A.D.2d 261 (1st Dep’t 1999)	16
<i>Addressing Sys. & Prod., Inc. v. Friedman</i> , 59 A.D.3d 359 (1st Dep’t 2009)	12
<i>Bates Adv. USA, Inc. v. 498 Seventh, LLC</i> , 7 N.Y.3d 115 (2006)	12
<i>Bates Advertising USA, Inc. v. 498 Seventh, LLC</i> , 291 A.D.2d 179 (1st Dep’t 2002)	9
<i>Chateau D’If Corp. v. City of New York</i> , 219 A.D.2d 205 (1st Dep’t 1996)	15
<i>Elting v. Shawe</i> , 129 A.D.3d 648 (1st Dep’t 2015)	8
<i>GFI Brokers, LLC v. Santana</i> , No. 06-cv-3988 (GEL), 2008 WL 3166972 (S.D.N.Y. Aug. 6, 2008)	15
<i>Gilman v. N.Y. State Div. of Housing & Community Renewal</i> , 99 N.Y.2d 144 (2002)	15
<i>Hackenheimer v. Kurtzmann</i> , 235 N.Y. 57 (1923)	10
<i>In re 305 E. 61st St.</i> , 130 F.4th 272 (2d Cir. 2025)	23, 24, 25

<i>Jarro Bldg. Indus. Corp. v. Schwartz,</i> 54 Misc.2d 13 (App. Term 2d Dep't 1967)	15
<i>JMD Holding Corp. v. Cong. Fin. Corp.,</i> 4 N.Y.3d 373 (2005)	passim
<i>Kalt v. Ritman,</i> 50 A.D.3d 469 (1st Dep't 2008)	8
<i>LeRoy v. Sayers,</i> 217 A.D.2d 63 (1st Dep't 1995)	9
<i>People v. Olivera,</i> 45 A.D.3d 154 (1st Dep't 2007)	28
<i>Piatek v. New York City Transit Auth.,</i> 14 A.D.3d 685 (2d Dep't 2005)	21
<i>Seidlitz v. Auerbach,</i> 230 N.Y. 167 (1920)	10
<i>Serino v. Lipper,</i> 123 A.D.3d 34 (1st Dep't 2014)	24, 25
<i>Taveras v. Tuck-It-Away Assocs., L.P.,</i> 243 A.D.3d 427 (1st Dep't 2025)	16
<i>Truck Rent-A-Center v. v. Puritan Farms 2nd, Inc.,</i> 41 N.Y.2d 420 (1977)	9, 14
<i>Trustees of Columbia Univ. in City of New York v. D'Agostino Supermarkets, Inc.,</i> 36 N.Y.3d 69 (2020)	4
<i>United Nat'l Funding, LLC v. Volkmann,</i> 25 Misc.3d 1233(A) (Sup. Ct. N.Y. Cnty. Nov. 17, 2009).....	10
<i>Yudell v. Gilbert,</i> 99 A.D.3d 108 (1st Dep't 2012)	24

Plaintiffs-Appellants Norberto Jorge Levin and Fondo de Inversion Privado Levin Global (“Levin Global” or the “Fund”) (collectively, “Plaintiffs”) submit this reply brief in further support of their appeal from the Judgment of the Supreme Court of the State of New York, New York County (Schechter, J.), dated January 22, 2025 (the “Judgment”). (A. 4-7).

PRELIMINARY STATEMENT

It is undisputedly the burden of the party seeking to avoid a liquidated damages provision to establish either that the amount of damages were readily ascertainable at the time of contracting or that the amount of the liquidated damages is grossly disproportionate to foreseeable losses. The Trial Court did not properly apply this test, and Defendants did not satisfy it.

Defendants concede that the amount of damages were not readily ascertainable, (Resp. Br. at 31), meaning they were required to prove that the liquidated damages amount at issue was grossly disproportionate. They did not do so. The Trial Court’s finding in the Decision¹ that “[n]o specifics were provided of any substantive discussions of potential damages” (A. 8), acknowledged the absence of any evidence regarding disproportionality. Defendants’ contention, too, that the “sum total” of the discussion regarding raising the liquidated damages provision to

¹ Defined terms not otherwise defined herein have the same meaning as that ascribed to them in Appellants’ Opening Brief (NYSCEF Doc. No. 9).

\$1 million was contained in a single email where Salvini agreed to raise the liquidated damages amount to \$1 million, (Resp. Br. at 19), similarly concedes that there is no evidence of any disproportionality.

In the absence of such evidence, the Decision solely discussed language from Section 13 and whether any credible evidence supported the conclusion that the parties had “actually discussed the difficulty of establishing damages, what the actual monetary damages to the Fund looked like after a breach of the non-compete or any actual Fund financial metrics.” (A. 8). This was not a substitute for Defendants’ offering evidence from which the Trial Court could determine whether the \$1 million was grossly disproportionate to foreseeable losses.

In an attempt to support the Trial Court’s decision, and overcome the lack of evidence demonstrating disproportionality, Defendants rely on claimed evidence of the “penal intent” (a phrase they invent, as it appears nowhere in case law) of the provision and post-hoc rationalizations that were not raised below. In particular, Defendants’ and the Trial Court’s reliance on the supposed penal effect of disincentivizing disloyalty, does not establish gross disproportionality. Defendants and the Trial Court cite no cases that the intent or purpose of a liquidated damages provision controls and, indeed, the case law is the exact opposite. The sole question is whether Defendants established that the \$1 million was grossly disproportionate. They did not.

Defendants' attempt to justify exclusion of Exhibit P-47 and related testimony is similarly full of post-hoc objections and evidence they never introduced at trial. At times, Defendants make arguments that are irreconcilable with their claims at trial and the jury's verdict.

For example, Defendants somehow assert that operating company profits never flowed up to the Fund because the Fund was "never intended" to distribute dividends. That contradicts everything Defendants said at trial. Defendants asserted claims for breach of contract due to unpaid dividends, and during the trial they presented evidence that the Fund made \$1 million in gross revenue from its operating companies in 2014. The jury credited this testimony and awarded Defendants unpaid dividends. For Defendants to contend now that profits never reached the Fund and dividends were never intended to be paid is incredible.

The Trial Court excluded Exhibit P-47 for one reason: that, in its view, the losses at the operating company level were not recoverable. This was an error, because even if not recoverable, those losses were still relevant to damages at the Fund level, which were recoverable. After all, Defendants relied on profits from the operating companies that flowed up to the Fund to establish they were owed dividends. The Trial Court erroneously prevented Plaintiffs from doing the same with losses.

ARGUMENT

I. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD AND THE DECISION SHOULD BE REVERSED

It was Defendants’ burden to show either that the \$1,000,000 was plainly or grossly disproportionate to the probable loss or the amount of the loss was readily ascertainable. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (2005) (a defendant “must demonstrate either that damages . . . were readily ascertainable at the time [the parties] entered into their . . . agreement, or that . . . [the remedy] is conspicuously disproportionate to these foreseeable losses.”); *see also id.* (“The burden is on the party seeking to avoid liquidated damages”); *Trustees of Columbia Univ. in City of New York v. D’Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 75 (2020) (“Defendant, as the party seeking to avoid payment of liquidated damages, has the burden of establishing that the damages for breach of the surrender agreement were disproportionate to the foreseeable losses and in fact, a penalty.”) (internal quotation marks and citation omitted).

Defendants concede that that the damages were not readily ascertainable at the time the parties entered into the 2015 Contributors Agreement. (Resp. Br. 31) (“Any . . . damages suffered by these Appellants as a result of Respondents’ breach of Sec. 8 certainly are not ‘easily ascertainable.’”) They also concede that it was their burden to prove the amount was penalty. (Resp. Br. at 15). Thus, given their concession that the damages were not readily ascertainable, Defendants were

required to prove that the \$1 million was disproportionate, but they presented no evidence on the matter, nor did the Trial Court discuss disproportionality in its Decision. Nothing in the Trial Court record suggests a precise figure of probable damages at the time the 2015 Contributors Agreement was entered into, and nothing in the record suggests that such a figure, even it had been proven, rendered the \$1 million grossly disproportionate.

Defendants argue that the Trial Court properly relied on the language of the Contributors' Agreement, witness testimony, and correspondence to conclude that Section 13.1 was intended to be both "coercive and punitive". (Resp. Br. at 21). None of these items establish the necessary gross disproportionality.

Given the absence any evidence of disproportionality, the Trial Court's Decision should be reversed and Defendants' arguments in opposition to Appellants' arguments rejected.

A. The Trial Court Acknowledged The Lack Of Evidence Of Gross Disproportionality And Improperly Placed The Burden On Appellants

Rather than examining whether that the \$1 million was disproportionate to foreseeable losses, the Trial Court instead looked for evidence as to whether the contracting parties "discussed the difficulty of estimating damages,^[2] what the

² As noted above, given Defendants' concession that the damages could not be reasonably estimated, it is of no moment whether or not such issue was discussed.

actual monetary damages to the Fund looked like after a breach of the non-compete or any actual Fund financial metrics in increasing” the liquidated damages amount from \$20,000 to \$1,000,000. (A. 8). By imposing such requirements, the Trial Court incorrectly placed the burden on Appellants to demonstrate the reasonableness of the amount, by evidence that such matters were discussed no less, when it is axiomatic that it is Defendants’ burden to prove disproportionality.

In fact, the Trial Court’s statement that “[n]o specifics were provided of any substantive discussions of potential damages” (A. 8), acknowledged the absence of evidence of disproportionality. Defendants contend, too, that the “sum total” of the discussion regarding raising the liquidated damages provision to \$1 million was contained in Ex. DX-DD, (Resp. Br. at 19), in which both Mr. Levin and Salvini agreed to raise the liquidated damages amount to \$1 million, and in which Salvini acknowledged that the Contributors were “imprecise and naïve” in the 2011 version of the Contributors Agreement. Nothing in this email exchange indicates the \$1 million is in any way disproportionate or suggests a precise figure of probable damages at the time of contracting from which disproportionality could be inferred. Nevertheless, the Trial Court turned the burden of proof on its head and placed the burden on Appellants to show, through evidence of discussions, that the amount was reasonable.

B. The Trial Court's Credibility Determinations Do Not Establish Disproportionality

Defendants contend that the Trial Court properly disbelieved Mr. Levin and Mr. Di Paolantonio's testimony concerning the reasonable estimation of the \$1 million liquidated damages amount and that this supports the conclusion that the amount is an unenforceable penalty. Defendants' reliance on their interpretation of the Trial Court's findings of credibility, and the asserted deference given to such findings, is misplaced. (*See* Resp. Br. at 18).

First, the question of whether Section 13.1 is unenforceable is a question of law that should not turn on the credibility of the witnesses. *JMD Holding Corp.*, 4 N.Y.3d at 379 (“Whether the early termination fee represents an enforceable liquidation of damages or an unenforceable penalty is a question of law...”)

Second, Mr. Levin's and Mr. Di Paolantonio's testimony that the revenues of the Fund were about \$15 million and profits were about \$1 million in 2014, the year before the Contributors entered into the 2015 version of the Contributors Agreement raising the liquidated damages amount to \$1 million, was uncontroverted and, as discussed in more detail in Part II.A, *infra*, actually relied upon both by Defendants in seeking relief and the jury in awarding such relief. (A. 288, 492). While Mr. Levin did, as the Court noted, testify that there “was no mathematics in it”, (A. 288), referring to the determination of the \$1 million amount, that was because, as

Defendants concede, the amount of damages was not readily ascertainable, so it was what “made common sense.” (*Id.*)

Third, whether or not the Trial Court believed Mr. Levin’s and Mr. Di Paolantonio’s uncontroverted testimony concerning the revenues and profits of the Fund, or their conclusions that such amount was reasonable, (*see* A. 492), is beside the point since there is no evidence on the issue of disproportionality. In ruling based on Mr. Levin’s and Mr. Di Paolantonio’s credibility, the Trial Court again was putting the burden on Appellants to prove the reasonableness of the \$1 million, rather than placing the burden on Defendants where it belonged.

Fourth, even if the Trial Court’s findings should be given deference, they need not be where the determination cannot be reached under any fair interpretation of the evidence. *See Elting v. Shawe*, 129 A.D.3d 648, 648 (1st Dep’t 2015) (reversing motion court’s decision because “factual determination . . . is not based on a fair interpretation of the evidence.”); *Kalt v. Ritman*, 50 A.D.3d 469, 469 (1st Dep’t 2008) (reversing post-trial judgment and concluding, contrary to Trial Court’s determination, that payment was not a loan). Here, in the absence of any evidence of disproportionality, the Trial Court’s finding should not be given deference.

C. **The Email Communications Discussing Increasing The Liquidated Damages Amount Do Not Demonstrate Disproportionality**

Defendants’ reliance on DX-DD is similarly misplaced. According to Defendants, the “sum total of the ‘discussion’”, (Resp. Br. 19), regarding the

liquidated damages amount was in this email, where Salvini agreed to raise the liquidated damages amount to \$1 million. As discussed in Part I.A, Defendants point to nothing in this email that shows that the \$1 million is grossly disproportionate to foreseeable losses (because there is nothing), underscoring Defendants' failure to adduce evidence on the salient issue of disproportionality.

Defendants also rely, as did the Trial Court, on DX-EE. Defendants contend that there is no mention in this email showing the amount of loss that a violation of the Contributors Agreement's non-compete provision would cause to the Fund. (Resp. Br. at 20). But, again, that places the burden on Appellants, when it is Defendants' burden to show disproportionality. This email, in which Mr. Levin notes that he and Salvini agreed to raise the amount of \$1 million, (A. 1623), does not suggest the \$1 million was disproportionate.

D. Defendants' Argument That There Must Be An Attempt To Proportion Damages Is Contrary To Recent Court Of Appeals Precedent

Defendants next attempt to support the Trial Court's conclusion by arguing that there must be some attempt to proportion damages to actual loss. (Resp. Br. at 21). Not so.

LeRoy v. Sayers, 217 A.D.2d 63 (1st Dep't 1995), cited by Defendants, has been distinguished by later case law. As noted in *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 291 A.D.2d 179, 183 (1st Dep't 2002) (citing *Truck Rent-A-Center v.*

v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 425 (1977)), nothing in *Leroy* changed the fundamental rule that “sets aside liquidated damages clauses only when ‘the amount fixed is plainly or grossly disproportionate to the probable loss.’”

Indeed, both cases cited by Defendants—*LeRoy* and *United Nat’l Funding, LLC v. Volkmann*, 25 Misc.3d 1233(A) (Sup. Ct. N.Y. Cnty. Nov. 17, 2009)—rely on the essentially overturned, 100-year-old case *Seidlitz v. Auerbach*, 230 N.Y. 167 (1920). *Seidlitz* invalidated liquidated damages as disproportionate because it found they applied even if the breach was minor. Since then, however, courts have adopted a presumption that liquidated damages apply only to material breaches, regardless of whether an agreement makes this explicit or not. *JMD*, 4 N.Y.3d at 384. Indeed, it took only three years after *Seidlitz* was decided for the Court of Appeals to backtrack from *Seidlitz* in *Hackenheimer v. Kurtzmann* 235 N.Y. 57 (1923). There, the Court upheld a liquidated damages provision as enforceable against a material breach of contract even where, read literally, the contract suggested their availability for trivial breaches, lest “*Seidlitz* ‘may be pressed to so extreme a conclusion as to make impossible to draw any contract providing for such [liquidated] damages.’” *JMD*, 4 N.Y.3d at 384 (discussing *Seidlitz* and *Hackenheimer*).

Putting aside these easily distinguishable cases, Defendants do not cite a single case to support their contention that a liquidated damages provision must proportion amounts to actual damages in the absence of proof that the amount is

grossly disproportionate. (Resp. Br. at 22). Even if it were a requirement, as set forth in Plaintiff's Opening Brief, at 10-12, Mr. Levin and Mr. Di Paolontinio both testified that the amount was based on damages a breaching contributor could cause.

Defendants also acknowledge the trend of sustaining liquidated damages provisions, and that such provisions should be upheld "as long as they do not clearly disregard the principle of compensation." Defendants argue that that the liquidated damages provision here violates the principle of compensation. (Resp. Br. at 22 (citing *JMD Holdings*, 4 N.Y.3d at 381)). The principle of compensation is simply another way of saying the liquidated damages cannot be grossly disproportionate. Moreover, Defendants' quotation from *JMD* actually undermines Defendants' position. The full quotation refers to the undisputed trend favoring freedom of contract through enforcement of liquidated damages provisions. *JMD*, 4 N.Y.3d at 380-81 ("(I)t has become increasingly difficult to justify the peculiar historical distinction between liquidated damages and penalties. Today the trend favors freedom of contract through the enforcement of stipulated damage provisions so long as they do not clearly disregard the principle of compensation.") (quoting 3 Farnsworth, *Contracts* § 12.18, at 303-304 (3d Edition)). The quotation follows the admonition that the Court of Appeals has "cautioned generally against interfering with parties' agreements." *Id.* at 381.

Finally, Defendants did not put on any actual evidence that the \$1 million “clearly disregard[s] the principle of compensation.” Attorney argument is meaningless where, as here, Defendants cannot cite anything in the trial record that would overcome multiple presumptions of validity.

E. Whether Liquidated Damages Disincentivize Breach Is Irrelevant Unless The Damages Are Disproportionate

Defendants argue that there was “overwhelming” evidence that the liquidated damages were intended as a coercive deterrent against competition and that this evidence supports the Trial Court’s conclusion. (Resp. Br. at 15, 17). But that is not the test. This focus on whether the provision at issue “disincentivize[d] disloyalty,” (A. 8), has been repeatedly rejected by the Court of Appeals and this Court.

In *Addressing Sys. & Prod., Inc. v. Friedman*, 59 A.D.3d 359, 360 (1st Dep’t 2009) (citing *Bates Adv. USA, Inc. v. 498 Seventh, LLC*, 7 N.Y.3d 115, 120 (2006)), this Court held that “[t]he fact that a liquidated damages clause was designed to provide an incentive not to breach does not transform such provision ‘into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses.’” Indeed, the Court of Appeals in *Bates Adv.*, 7 N.Y.3d at 120, rejected the defendants’ argument that the liquidated damages clause was unenforceable because its purpose was to “incentivize” the landlord and provide “a club over his head to make sure gets the work done,” because “the prospect of

damages in the event of breach may always be said to encourage parties to comply with their contractual obligations.” Were the mere fact that a liquidated damages provision disincentivized breach enough, no liquidated damages could survive. Plaintiffs cited both *Addressing Sys.* and *Bates Adv.* in their Opening Appellant’s Brief at 28, and Defendants have made no attempt to address them.

In short, controlling precedent makes clear that, even if Section 13.1 operated on some level to disincentive disloyalty or was designed to, this would render the provision unenforceable only if the damages amount were disproportionate to foreseeable losses. The Trial Court made no such findings. (A. 8).

F. Defendants’ Claimed “Penal Intent” Continues To Use The Wrong Test And Fails On The Merits As Well

Defendants next contend that they did not need to put in evidence of disproportionality because “penal intent” can be inferred from the face of the Contributors Agreement and is admitted by Mr. Levin and the Fund. (Resp. Br. at 23). This is incorrect for several reasons.

First, Defendants acknowledge a “paucity of cases” supporting their contention that liquidated damages can be held unenforceable absent disproportionality. (Resp. Br. at 24). Indeed, they cite no cases—nor are Plaintiffs aware of any—that support this contention. The term “penal intent” appears to be their own invention. It cannot be found in the relevant case law.

Second, Defendants' argument relies on the header to Section 13, which refers to "Penalties," and language in Section 13.2. But how parties label a provision is not dispositive. The Court of Appeals has made clear that, "[i]n interpreting a provision fixing damages, it is not material whether the parties themselves have chosen to call the provision one for 'liquidated damages,' . . . or have styled it as a penalty. . . . Such an approach would put too much faith in form and too little in substance." *Truck Rent-A-Ctr.*, 41 N.Y.2d at 425. Defendants never address *Truck Rent-A-Ctr.*'s clear holding in any way.

Third, in relying on Mr. Levin's testimony explaining his understanding of the Spanish word "multa" and how it was used in the Contributors Agreement, Defendants ignore the full context of his testimony. Mr. Levin said that the term "multa" "can be interpreted either as repair of damage or punishment. Either way, you have to repair a wrong you made." (A. 466). He also testified, "Well, basically, I think the word 'fine' is there meaning that if you did something wrong, you must pay for it. So, I think that was the original intent." (A. 277). He further testified that Section 13.1 was not intended to coerce the contributors into complying with the Contributors Agreement or punish them. (*Id.*)

1) Section 13.2 Does Not Establish Penal Intent

Defendants next rely on Section 13.2, claiming that this provision's reference to additional damages automatically renders Section 13.1 unenforceable. (Resp. Br.

at 27). But, as noted in Appellants' Opening Brief, at 34, the language used in Section 13.2 is similar to language from the analogous case of *GFI Brokers, LLC v. Santana*, No. 06-cv-3988 (GEL), 2008 WL 3166972, at *11–12 (S.D.N.Y. Aug. 6, 2008). Under *GFI Brokers*, to the extent that New York law precludes the availability of actual damages in a contract providing for liquidated damages, Section 13.2 does not provide for additional, actual damages because such damages would not be “other applicable damages in accordance with general rules of law” in New York. As with other cases at odds with their position, Defendants never mention this case.

Defendants' reliance on Mr. Levin's understanding of what Section 13.2 may or may not permit, (Resp. Br. at 28), is not germane. For this same reason, Defendants' citation to *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205 (1st Dep't 1996) and *Jarro Bldg. Indus. Corp. v. Schwartz*, 54 Misc.2d 13 (App. Term 2d Dep't 1967), are inapposite—if New York law does not allow a party to recover damages beyond liquidated damages set forth in a contract, Section 13.2 therefore does not permit further damages, and does not run afoul of New York's rule.

Defendants also rely on a 2013 email introduced in their Respondents' Appendix, apparently to argue that the \$1 million was disproportionate. First, Defendants did not introduce this exhibit at trial, and it may not be considered now. See *Gilman v. N.Y. State Div. of Housing & Community Renewal*, 99 N.Y.2d 144,

150 (2002) (“The acceptance of new evidence on appeal is generally contrary to appellate practice simply because it is unfair to allow a party, on appeal, to rewrite the factual record in the proceeding.”). Second, the circumstances in 2013 do not demonstrate that the \$1 million amount agreed upon two years later in 2015 was disproportionate to foreseeable losses in 2015.

2) **Application Of Liquidated Damages Regardless Of The Length Of Competition And To Each Contributor Who Breaches Does Not Establish Disproportionality**

Defendants argue they demonstrated the disproportionality of the \$1 million liquidated damages amount because the amount applies regardless of how long the Contributors’ improper competition lasted. (Resp. Br. at 32-33).

Defendants did not make these arguments below (*see* NYSCEF Doc. No. 689), and they should not be permitted to raise it for the first time on this appeal. *Acosta v. Yale Club of New York City*, 261 A.D.2d 261, 261 (1st Dep’t 1999) (“Defendants’ estoppel argument is improperly raised for the first time on appeal, and we decline to review it.”); *Taveras v. Tuck-It-Away Assocs., L.P.*, 243 A.D.3d 427, 428–29 (1st Dep’t 2025) (arguments raised for the first time on appeal were not properly before the Court). The Trial Court also made no such findings.

This argument also ignores that the whole purpose of the non-compete was to compensate the non-breaching Contributors for what occurred here—namely Defendants’ secretly starting their own company and competing before they ever

gave notice to redeem their shares, to the great detriment of the company and other Contributors. Had Defendants properly given notice to redeem their shares before they began competing, the Levin entities would have been on notice of Defendants' intent to leave and could have made efforts to prevent losing customers. Defendants knew this, which is why they undertook clandestine efforts to place themselves in a better position than if they had simply left.

Indeed, the jury found that both Defendants breached the non-compete. (A. 920). Defendants' disingenuous attempt to argue that they merely formed a company, but did not actually compete, contradicts the jury's verdict and must be rejected. (Resp. Br. at 33).

Defendants' reliance on *LeRoy* to argue that the liquidated damages are disproportionate because they are the same whether a Contributor competes for a long period, or competes for only a brief period, is misplaced for two reasons. First, as discussed above, *LeRoy* relies on *Seidlitz*, and the concern in *Seidlitz* of applying liquidated damages to minor breaches has been addressed with a presumption that liquidated damages apply only to material breaches. *JMD*, 4 N.Y.3d at 384. Second, the only test is whether the amount is grossly disproportionate. As both Mr. Levin and Mr. Di Paolantonio testified, a Contributor luring away even a single client could easily cost the Fund significant amounts. (A. 288-90, 294, 299-300, 491-92). The losses from breaching competition could persist for years, particularly where a

Contributor, like Defendants did here, sabotaged the business before leaving and lured clients away with their underhanded advantage. (A. 325-39 (detailing Defendants' sabotage and poaching of largest client, Energisa)). The timing of the breach is not indicative of likely damages. Indeed, had Exhibit P-47 and related testimony not been improperly excluded, the exhibit and testimony would have established the damages Defendants' actions caused to be significantly more than the \$1 million liquidated damages amount. (*See* A. 1446; *see also* Part II, *infra*).

Defendants' contention that the application of \$1 million to each Contributor who breaches establishes gross disproportionality is also misguided. (Resp. Br. at 35). Whether or not each breaching Contributor worked for the same new company, as Defendants posit, each could have brought with him or her separate clients to the new company, thus each individually harming Levin Global. Imposition of \$1 million separately on each breaching Contributor makes perfect sense and does not render it grossly disproportionate.

G. Evidence Concerning Distributions Made By The Fund Or Of Its Debts Does Not Establish Gross Disproportionality

Defendants' argument that the amount of liquidated damages is grossly disproportionate because the Fund issued distributions only in 2014 or 2015 is without merit. (Resp. Br. at 35). The very fact that dividends were issued in that time period confirms the testimony of Messrs. Levin and Di Paolantonio that the Fund had significant revenues and profits in 2014. And Defendants' reliance on

claimed debts of Levin Brazil to argue the Contributors could not expect dividends is both odd, given their insistence that damages to the operating company level did not flow up to the Fund, and irrelevant. *See also* Part II.A, *infra*. Whether or not Levin Brazil had financial difficulties in 2015 (which were caused by Defendants’ sabotage and competition, *see* Opening Brief at 14-18), or whether distributions would be paid in 2015, in no way demonstrates that Defendants’ breaches could not cause significant damages or indicate that the \$1 million was grossly disproportionate. In any event, the Trial Court did not rely on this fact in the Decision.

II. THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE RELATING TO COSTS AND LOSSES AS WELL AS EXHIBIT P-47

A. Defendants Sought Unpaid Dividends From 2014 At Trial, Which Belies Their Contention Now That Dividends Were “Never Intended” To Be Paid By The Fund

Defendants dispute that profits of the operating companies flowed up to the Fund and were paid out to Contributors as dividends. Specifically, they somehow assert that deposition testimony (which is not properly in the record) proves the Fund “never distributed any dividends to the Contributors, and was never intended to do so.” (*See* Resp. Br. at 38-39). This is a bizarre argument for Defendants to make because they said the opposite at trial when they sought, and were awarded, unpaid dividends from the Fund. Defendants’ argument is irreconcilable with their arguments below and the jury’s verdict. The Court should disregard it out of hand.

Throughout proceedings in front of the Trial Court, Defendants asserted causes of action for breach of contract and argued that the Fund owed them unpaid dividends for 2014 under Section 6.1 of the Contributors Agreement. (*See* A. 239 (Defendants’ counsel’s opening statement at trial, saying: “Among other terms, the Contributors Agreement obligated the Fund to pay dividends to the contributors”); A. 985 (2015 Contributors Agreement: “6.1 Each year, the Fund shall distribute, as minimum dividend, 30% of the year’s net profits.”)). Defendants’ counsel told the Trial Court that “our calculation of the dividends for 2014 are based on Mr. Di Paolantonio’s testimony,” according to which Defendants said the Fund had profits, after tax, of “about [\$]600,000.” (A. 804; *see also* A. 492 (Mr. Di Paolantonio’s cross-examination by Defendants: “Q. Do you know what Levin Global, the Levin Global Fund’s revenues were in 2014? A. I believe that after tax it could have been around [\$]600,000 and before tax it was around a million.”)). Defendants’ counsel’s closing argument to the jury even asserted that “the Fund made approximately a million dollars, maybe a little less, 900 and some thousand dollars in 2014 and it’s not disputed that it never paid dividends on that.” (A. 853; *see also* A. 855-56 (Defendants’ counsel asking the jury to award unpaid dividends based on “30 percent of \$600,000”)).

The Trial Court instructed the jury to find whether Defendants were entitled to collect unpaid dividends from 2014, (A. 687), and the jury awarded Defendants

unpaid dividends. (A. 689-90). Accepting Defendants’ argument in this appeal would require setting aside the jury’s acceptance of Mr. Di Paolantonio’s testimony, overturning the jury’s finding that the Fund made \$600,000 in net profits in 2014, and nullifying the jury’s award of unpaid dividends to Defendants. Defendants have made no showing allowing this Court to do so. *See Piatek v. New York City Transit Auth.*, 14 A.D.3d 685, 686 (2d Dep’t 2005).

In short, Defendants argued—and the jury found—that the Fund made \$600,000 in net profit for the year 2014. That profit came from the operating companies because it is uncontested that the Fund itself has no direct revenue. Defendants cannot credibly now argue the Fund never received any profits or distributed any dividends. That would contradict the jury’s award and be irreconcilable with their own claims and position at trial.

B. Losses And Costs At The Operating Company, Even If Not Recoverable, Were Relevant To Damages Sustained By The Fund

Defendants contend that Exhibit P-47 was properly excluded because it summarized costs and losses suffered by Levin Brazil, which are only recoverable in a derivative claim. (*See* Resp. Br. at 39-42). Defendants thus make the same error as the Trial Court by conflating “recoverable” with relevant. (*See* A. 176 (discussing whether the losses are recoverable before excluding Exhibit P-47)). Even if the costs and losses summarized by Exhibit P-47 were not themselves recoverable, they were still relevant to calculating the Fund’s damages. (*See* A.94) (Plaintiffs’ counsel

stating, “This is very relevant evidence, because if we are going to, as your Honor has told us we need to, show damages at the fund level, we need to understand what happened at the operating company level.”).

As discussed above, Defendants themselves sought unpaid dividends based on the profits realized by the Fund in 2014. *See* Part II.A., *supra*. To do this, Defendants presented evidence of revenues and profits at the operating-company level, which they then argued had flowed up to the Fund and should have been distributed to them as dividends. (*See* A. 492; A. 804). The Trial Court permitted introduction of this evidence, seeing its relevance even though such revenues and profits were created by, and derived from, the operating companies and not the Fund itself.

Exhibit P-47 was Plaintiff’s attempt to do the same thing—*viz.*, introduce evidence of costs and losses at the operating company level that were similarly relevant to establishing the Fund’s damages. But the Trial Court inconsistently ruled that what was good for Defendants was not allowed for Plaintiffs.

C. Plaintiffs Assert Direct Claims For Breach Of The Contributors Agreement, Not Derivative Claims Based On Their Status As Stockholders

Defendants next argue that Plaintiffs have not asserted derivative claims and therefore cannot recover injuries caused to the operating companies, Levin Brazil and Levin Argentina. (*See* Resp. Br. at 39-42). They cite numerous cases for the

proposition that stockholders do not have direct claims for damages done to the company or for diminution in share value because those claims belong to the company itself. (*Id.* at 40-41).

This strawman argument starts from a flawed premise because Plaintiffs do not assert derivative claims based on their status as stockholders or for diminution of share value. Mr. Levin asserts a claim for breach of the Contributors Agreement against the two Defendants who are signatories to that agreement. The claims therefore can be brought directly.

Case law backs this up. Interpreting New York law, the Second Circuit recently found that breach of contract is a “claim belonging to [the individual plaintiff] personally, rather than belonging to the corporation” and that the plaintiff “may pursue a direct claim even if he cannot state the claim without showing an injury to the corporation.” *In re 305 E. 61st St.*, 130 F.4th 272, 280-81 (2d Cir. 2025). The source of the duty is what matters, and the source in this case was a direct, contractual duty owed to plaintiffs personally. *See id.* at 281. The principles from *Yudell* and *Tooley*, upon which Defendants rely, do not apply. *See id.* This Court has arrived at a similar conclusion when considering breach of contract claims. *See Serino v. Lipper*, 123 A.D.3d 34, 42-43 (1st Dep’t 2014) (reversing lower court and reinstating claims for negligence/malpractice, breach of contract, and fiduciary duty because those claims were direct); *see also Accredited Aides Plus, Inc. v.*

Program Risk Mgmt., Inc., 147 A.D.3d 122, 132-34 (3d Dep’t 2017) (distinguishing between direct and derivative claims based on the source and object of the duty owed to the plaintiff).

This distinction between a stockholder derivative claim and a direct claim for breach of contract is apparent in *Yudell* itself. The *Yudell* court considered a claim for breach of fiduciary duty—a claim that arises by virtue of shareholder status, not based on contract—and it found that the claim was derivative. *Yudell v. Gilbert*, 99 A.D.3d 108, 115 (1st Dep’t 2012). *Yudell* did not address a claim for breach of contract. In contrast, plaintiffs can “allege that the wrongdoer has breached a duty owed directly to the [plaintiffs] which is independent of any duty owing to the corporation,” and they can do so by “seek[ing] to vindicate independent contractual obligations owed to [plaintiff] individually.” *In re 305 E. 61st St.*, 130 F.4th at 282.

That is precisely what Plaintiffs have done here. Plaintiffs asserted claims for breach of the Contributors Agreement, on which the jury found they had prevailed. (See A. 920). None of the operating companies are signatories to the Contributors Agreements, only the individual contributors are, including Mr. Levin and Defendants. (A. 992 (signature page)). Defendants owed contractual duties directly to Mr. Levin, and Defendants’ breach of those duties gives rise to a direct claim by Mr. Levin against them. See *In re 305 E. 61st St.*, 130 F.4th at 280-81; *Serino*, 123 A.D.3d at 42; *Accredited Aides*; 147 A.D.3d at 132-34.

The language of the Contributors Agreement supports this conclusion by expressly allowing Plaintiffs (and the other individual contributors) to seek their damages directly from a breaching party. That is why Section 13.1 provided that “the party in breach or the violator” would pay liquidated damages, and those damages would “be distributed among the Remaining Contributors prorating for their interests in the Fund,” not given to the operating companies or any other corporate entity. (*See A. 989*).

In short, Mr. Levin has asserted a direct claim for breach of contract and, in accordance with the terms of the Contributors Agreement, may seek remedies directly from Defendants. Plaintiffs should have had the opportunity at trial to quantify their damages by presenting to the jury the tremendous losses caused by Defendants’ corporate sabotage and competition. The Trial Court improperly denied them this opportunity.

D. Foundation For Admitting Exhibit P-47 Would Have Been Given At Trial Had The Trial Court Not Preemptively Excluded It For Other Reasons

Defendants never challenged Exhibit P-47’s admission based on hearsay or a lack of foundation to establish the business record exception before the Trial Court. They did not make this objection (or any objection at all) at the pretrial conference, (*see A. 92-93*), nor did they affirmatively assert this specific objection at any time,

(*see* A. 89-159). Defendants waived this objection and have now improperly raised it for the first time on appeal.

In any event, Defendants misconstrue the Trial Court’s ruling and the record concerning the necessary foundation. The Trial Court’s decision to exclude Exhibit P-47 never referenced missing foundation testimony or any failure to establish an exception to hearsay. (A. 171-75). The Trial Court made clear during pre-trial proceedings on August 25, 2024, that it excluded Exhibit P-47 solely on the basis that, in its view, the losses it summarized were not recoverable. (A. 174-75 (“And I actually looked at almost everything you cited. . . . [B]ut you know what, none of it matters to me, and let me tell you why . . . These damages are not recoverable, period.”)).

During the attorney-only proceedings before the Trial Court on August 24, 2024, and August 25, 2024, Plaintiffs’ counsel represented multiple times that Mr. Levin could provide foundation to establish that the business records underlying Exhibit P-47 were themselves admissible through testimony at trial. (*See, e.g.*, A. 129-30, 183-84). Mr. Levin would have testified as to the source of the information summarized in Exhibit P-47 and established that those sources were contemporaneously created and kept in the ordinary course—such as invoices, bank records, financial statements, *etc.*

However, because the Trial Court’s ruling had nothing to do with the business record exception to hearsay, the Trial Court never weighed in on that issue and gave Plaintiffs no opportunity to provide any foundational testimony. (A. 174-77). The assertion that Plaintiffs failed to establish this exception is therefore nonsensical, as Plaintiffs were never given the chance.

E. The Trial Court Did Not Exclude Exhibit P-47 Based On Prejudice, Confusion, Or Potential To Mislead

Defendants also (incorrectly) contend that the Trial Court excluded Exhibit P-47 because it risked confusing the jury. (*See* Resp. Br. at 42-43). Again, this is not why the Trial Court excluded Exhibit P-47. *See* Part II.D., *supra*.

Plaintiffs’ counsel proffered that Mr. Levin’s expected testimony would connect the dots between losses at the operating companies and losses at the Fund level. (*See* A. 183-184). Yet, the Trial Court never allowed Plaintiffs a chance to present this testimony or explain the methodology behind calculation of losses at the Fund level. (*Id.*)

Defendants also argue that Exhibit P-47 is “misleading” because it did not include data showing profit and loss for all Levin Global companies. (*See* Resp. Br. at 45-46). Again, this argument was never presented to the Trial Court. Regardless, questions about inclusion or exclusion of certain data should have been handled in cross examination or by introduction of rebuttal evidence. On its face, Exhibit P-47 clearly labels categories of losses and Mr. Levin would have orally explained at trial

how those losses derived from Defendants' breaching conduct. (*See* A. 1446). None of this is opinion testimony; Mr. Levin would only have explained facts. It was the jury's prerogative to weigh that testimony and decide whether they found it credible. *See People v. Olivera*, 45 A.D.3d 154, 157 (1st Dep't 2007) ("It is for the jury to decide what weight is to be given to evidence.").

F. Defendants Misrepresent Facts About Mr. Levin, Who Could Competently Testify About Costs and Lost Profits

Defendants assert, without a citation, that Mr. Levin "was not an owner or officer of Levin Brazil." (Resp. Br. at 48-49). That is false. Levin Global was established by Mr. Levin's father, and Mr. Levin became its owner in 1989. (*See* A. 259). The organizational chart introduced into evidence at trial shows Mr. Levin is a direct owner of Levin Brazil, as well as an indirect owner with the other contributors through the Fund. (*See* A. 261-62; A. 1027). Mr. Levin testified he was the CEO of the entire Levin organization and that the entire Levin Global corporate structure operated as "part of the same group, the same firm." (*See* A. 262; A. 470). Defendants offer nothing to contradict this testimony.

Instead, Defendants cherry-pick an exchange where Mr. Levin stated Defendants were "short on their explanations of what was going on in Brazil" during weekly meetings with them. (*See* Resp. Br. at 49). This out-of-context statement has no bearing on Mr. Levin's competence to give testimony. Even while Defendants worked at the company, Mr. Levin was owner and CEO of the company,

and in that role, he received regular reports about Levin Brazil's operations. (*See* A. 299 (discussing meetings about operations in Levin Brazil); A. 326-29 (discussing his participation in weekly meetings concerning clients of Levin Brazil)). Even if this were not the case, the statement cited by Defendants concerned activities in Brazil at the time Defendants worked there, whereas the relevant losses were incurred after Defendants left and Mr. Levin personally took control of all operations in Brazil. (*See* A. 224, A. 337-39) (discussing the impact of Defendants' conduct on Levin Brazil)). It is uncontested that Mr. Levin had first-hand knowledge of the losses to which he would have testified. (*See id.*)

Defendants' citation of *Abra Construction Corp. v. 112 Duane Associates, LLC*, 59 A.D.3d. 263 (1st Dep't 2009) is inapposite because the witness in that case was offering an opinion as to the proper percentage of the contract price to designate as lost profit. Mr. Levin was not opining. He would have testified as a fact witness on the losses that were incurred because of Defendants' corporate sabotage and competition, which were documented by Exhibit P-47 and the business records underlying it. Case law allows owners and CEOs to do exactly this. *See* Opening Appellant Brief at 37-38.

CONCLUSION

Accordingly, Appellants request that this Court: (1) reverse the Decision's holding that the liquidated damages provision in Section 13.1 of the Contributors

Agreement was unenforceable and direct entry of judgment in favor of Plaintiffs in the amount of \$1,000,000 each against Defendants Salvini and Gugliano, for a total of \$2,000,000 million, in accordance with said provision, plus pre- and post-judgment interest; and (2) reverse the Trial Court's ruling that precluded Plaintiffs from presenting admissible evidence relevant to damages incurred by the Levin Global Fund, including Exhibit P-47 and related testimony, and remand this case for additional proceedings concerning Plaintiffs' damages.

Dated: New York, New York
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